IN THE

# Supreme Court of the United States

**October Term, 1976**

**No. 76-622**

JOHNSON BRONZE COMPANY,
*Petitioner,*

v.

ANGELINE R. OSTAPOWICZ,
*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATUTE.



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### I.
### Opinions Below

The opinion of the court of appeals is reported at 541 F.2d 394 (3rd Cir. 1976). The opinion of the district court is reported at 369 F. Supp. 522 (W.D. Pa. 1973).

### II.
### Jurisdiction

The jurisdictional prerequisites are adequately set forth in Petitioner Johnson Bronze Company's (hereinafter "Johnson") Petition For Writ of Certiorari to the United States Court of Appeals for the Third Circuit (hereinafter the "Petition").

## III.

### Statute Involved

The statute involved is set forth in Appendix E and F of the Petition.

## IV.

### Questions Presented

A. HAVE THE JURISDICTIONAL PREREQUISITES TO A TITLE VII ACTION SET FORTH IN McDONNELL DOUGLAS CORP. V. GREEN BEEN SATISFIED WHERE: (1) IN 1968 A UNION, ON BEHALF OF "THE FEMALE EMPLOYEES" FILED A TIMELY EEOC CHARGE ALLEGING A GENERAL PATTERN OF LAYING OFF FEMALES IN VIOLATION OF SENIORITY RIGHTS; (2) THE EEOC IN AUGUST, 1970 FOUND "REASONABLE CAUSE" AFTER INVESTIGATING THE SHIPPING DEPARTMENT OF THE EMPLOYER; (3) A FEMALE UNION EMPLOYEE WHO WORKED IN THE SHIPPING DEPARTMENT AND ANOTHER DEPARTMENT OF EMPLOYER FILED ADDITIONAL CHARGES ALLEGING VIOLATION OF SENIORITY RIGHTS IN THE FALL OF 1970; (4) THE EMPLOYEE RECEIVED A RIGHT TO SUE LETTER UNDER THE 1968 CHARGE AND FILED A TIMELY FEDERAL ACTION APRIL 27, 1971; (5) ON MAY 10, 1971 THE EMPLOYEE RECEIVED RIGHT TO SUE LETTERS ON THE 1970 CHARGES AND (6) WITHIN 30 DAYS AMENDED HER COMPLAINT TO INCLUDE THE RIGHT TO SUE LETTERS?



B. WHERE AN EMPLOYEE CLASS OF FEMALES HAS ESTABLISHED A *PRIMA FACIE* CASE OF SEX DISCRIMINATION IN A TITLE VII ACTION, DOES THIS COURT'S LANGUAGE IN McDONNELL DOUGLAS CORP. V. GREEN, TO WIT: "the burden then must shift to the employer to articulate some legitimate nondiscriminatory reason . . ." MEAN THAT AN EMPLOYER NEED ONLY GIVE A CLEAR UTTERANCE OF NON-DISCRIMINATION, OR DOES THE LANGUAGE MEAN THE EMPLOYER MUST COME FORTH WITH CREDIBLE EVIDENCE TO OVERPOWER THE *PRIMA FACIE* CASE?

## V.

### Statement of the Case

#### A. Johnson's Credibility

The district court stated at 369 F. Supp. 537: "The court frankly in the light of all the testimony in the case does not believe the disclaimers of lack of intent to discriminate". This finding was specifically affirmed by the appellate court (Pet. A. 12a).[1]

#### B. Jurisdictional Facts

A charge was filed with the EEOC by Local 69, United Automobile, Aerospace and Agricultural Implement Workers of America on April 18, 1968 at Case No. YCL9-079 (herein-

[1] References are as follows: (1) Petition Appendix (Pet. A.) followed by Page; (2) Court of Appeal's Appendix (C.A.A.) followed by Vol. (A, B, C); Page; if Transcript, Date; (3) to Record (R) followed by Date and Page; if Exhibit (Ex.) designated Plaintiffs' (Plt's), Defendant (Def.) or Stipulation (Stip.).

after "1968 Charge") (C.A.A. C 205a). The union represented approximately 750 of Johnson's production and maintenance employees. The charge was brought by the union "in behalf of the female employees" and alleged general sex discrimination by Johnson.[2] The EEOC investigated this charge only as it related to the shipping department and found probable cause to believe the charge.

Conciliation efforts began in December, 1970 (Pet. A. 5a) but were unsuccessful. On March 29, 1971, the EEOC mailed to members of the union interested in the charge a letter stating that conciliation had failed in the 1968 Charge, and that all members of the class were entitled to sue in federal district court within thirty (30) days of the receipt of the letter. Respondent (hereinafter "Ostapowicz") as a member of the class, instituted suit on April 27, 1971, within the thirty (30) days after members of the class received the EEOC "right to sue" letters. The complaint as originally filed included as an exhibit to the complaint the "right to sue" letter, wherein Ostapowicz was designated a member of the class (C.A.A. C 6a). The complaint in this action also alleged two further charges, Case Nos. TCL1-0558 and TCL1-0802. These were filed (by the specific plaintiff) Ostapowicz, in this action with

[2] The charge states:

> "Beginning on or about December 1, 1967 and continuing to date the above named employer has discriminated against female employees by laying them off and continuing them in lay off status in violation of their seniority rights while retaining and recalling male employees with less seniority to perform jobs which the women were entitled to by virtue of their seniority" (C.A.A. C 205a).

In Johnson's Petition at 1, it classifies the 1968 Charge as the "Union's 1968 Shipping Department Charge". This is incorrect and not supported by the record.



the EEOC in the fall of 1970 (hereinafter "1970 Charges").[3] The 1970 Charges related to the shipping department (C.A.A. C 181a) and the first division of Johnson (Machine Shop). (C.A.A. C 183a). The EEOC did not investigate these charges, and a "right to sue" letter on these specific charges was not included as an exhibit in the original complaint filed April 27, 1971. On May 14, 1971, Ostapowicz in accordance with the Fed. R. Civ. P., 15a, before a responsive pleading was filed, amended her complaint by enclosing the "right to sue" letters issued on May 10, 1971 by the EEOC in the 1970 Charges (Pet. A. 26a; Finding 6).

### C. Liability Facts

#### *1. General scope of sex discrimination*

Ostapowicz introduced statistical and oral evidence indicating that there was sex discrimination permeating the Johnson plant. The statistical and oral evidence involves six areas of sex discrimination, which are as follows: (a) Shipping Department (Division 4); (b) Job Classifications and Divisions with no female employees; (c) Hiring Practices; (d) Division 1; (e) Lay offs, Recalls and Terminations; and (f) Promotion and Wages.

#### *2. Shipping Department*

The evidence indicated that through 1968 no woman held a heavy packing job (C.A.A. B 11-30-72:24; R. Stip. Ex. 74). In addition, Donna Sieminowski, a witness for *Johnson* stated in uncontradicted testimony that there was severe sex discrimination in Johnson's shipping department in 1968.

[3] Both Ostapowicz and Ferrante were laid off from the shipping department. Ferrante, laid off on September 22, 1967, was never called back until 1972. Ostapowicz was laid off May 3, 1968 (C.A.A. A 5-25-71:10).

(C.A.A. B 11-30-72:284a). The EEOC decision dated August 6, 1970, indicated no female was employed as a heavy packer in the shipping department (R. Stip. Ex. 27, p. 2). Johnson introduced no testimony which contradicted the evidence which indicated that females were prevented from being heavy packers.

Donna Sieminowski, a witness for *Johnson* stated that she had been able to do a job as a heavy packer, and that she believed that all females could have done the heavy packer's job *if they were not intimidated* (C.A.A. B 11-30-72:287a). Further, Johnson's witness stated a foreman in the shipping department said he would "take every girl machine operator in the shipping department and replace them with men" if a woman became a heavy packer (C.A.A. B 11-30-72:284; Finding 44, C.A.A. C 46a).

***3. Job classifications and divisions with no female employees***

As determined by the McBee personnel cards (R. Stip. Ex. 56) supplied by Johnson and the seniority list from the years 1960 to 1972 (R. Stip. Ex. 57) there have never been any females employed in the following divisions: foundry (Div. 3); tool room (Div. 6); strip manufacturing (Div. 2); maintenance (Div. 5); patter shop (Div. 10). Evidence established that no female was ever employed as a department trucker in Division 1 through 1967 when plaintiff Bayuk was laid off (Pet. A. 27a; Finding 12), and that no female was ever employed as a mail clerk after 1960 (Pet. A. 13; Finding 13). Although the mail clerk opportunities were not great in numbers, if any of eight different females would have been called at any time to be a mail clerk by the management from the year 1967 until 1972; the females would not have had their status as employees terminated in September of 1972 (Pet. A. 28a; Finding 14).



Johnson introduced no credible evidence which contradicted the statistics concerning the lack of female employees in the above named divisions; nor did Johnson introduce evidence to show a bona fide job qualification or a business necessity as a defense to the statistics that no women occupied these various classifications or worked in these various divisions.

***4. Hiring practices***

Ostapowicz introduced statistical evidence indicating that in 1965 Johnson hired thirteen men in Division 1 and no females (Pet. A. 28a). In 1966, the statistics showed that Johnson hired 52 men in division and one female (Pet. A. 28a; Finding 16; C.A.A. C 44a).[4]

The only female hired by Johnson in 1966 was a relative of a former chief electrician of Johnson (C.A.A. B 11-30-72:25; C.A.A. A 8-12-71:110, 111). Further, William Wise, personnel manager of Johnson stated that from the years 1963 through 1966 he could recall hiring only one woman in Division 1 (Pet. A. 28a; Finding 17).

Johnson introduced no evidence which contradicted the above statistics, and Johnson introduced no evidence which showed that the hiring was due to a bona fide job qualification or a business necessity. On the contrary, from all of the evidence submitted, it is obvious that women played a major role in Division 1 for all of the previous years in the history of Johnson. Johnson kept no record of how many applicants were women in Division 1 (Pet. A. 32a; Finding 43; C.A.A. C 46a).

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[4] Witness Coella stated she was told that no married women would be hired (C.A.A. A 8-12-71:124).

*5. Division 1 (Machine Shop)*

Of the total work force employed by Johnson, Division 1 employed slightly less than fifty percent (50%) of the employees (R. 10-26-71:7). During the years 1966 to 1972, the total employment of Johnson varied from 1,100 to 604 employees (R. Plt's Exs. VV, WW, XX, YY, ZZ, AAA, BBB).

In Division 1, Johnson divided the division into four different departments—aluminum, strip bushing, thin wall bearing and brass shops. In the four different departments there were a total of 220 different machine centers (C.A.A. C 31a). The EEO-1 Reports filed by the defendant from 1966 through 1972 indicate that in the years 1966 through 1972, at a minimum, there were at least 46 women working in Division 1 (Pet. A. 28a, 29a; Finding 20). It is possible for employees in Division 1 to qualify as first class machine operators in approximately 220 machine centers although some of the machine centers may not have first and second classifications.

In the years 1960 until the end of 1972 only two female employees were classified as first class machine operators in Division 1 (Pet. A. 29a; Finding 23); however, William Wise, personnel manager of Johnson indicated that Theresa Trivilino's classification was really not first class, but it would fall more in the second class category. (C.A.A. A 10-26-71:99). Thus, one woman qualified as first class on one machine center in a twelve year program.

It was established Johnson has no formal training program to help second class operators in the first division become first class (Pet. A. 30a; Finding 30; C.A.A. C 45a).

Johnson's witnesses, Mr. Chiarini, Mr. Harrison and Mr. Park all stated that the best way to be a first class operator was to have the experience of operating a machine and observation (C.A.A. B 2-13-73:613, 614; R. 2-13-73:617, 629). It



was determined that it was difficult for any operator to go to a machine which he has not operated and become first class immediately (C.A.A. B 2-13-73:637), and it is difficult to operate one type of machine in a machine center and see another type of machine in another machine center at the same time (C.A.A. B 2-13-73:638). It was further determined that because one knows how to set up one type of machine in one machine center, this does not mean that a person can set up another machine in another machine center (Pet. A. 30a; Finding 28).

The contract between Johnson and the union stipulated that if an employee bumps another employee on a machine, the employee must be able to operate the machine immediately upon making the bump[5] (Pet. A. 30a; Finding 29).

The evidence showed that on-the-job training was the way to become a first class machine operator because Johnson had no formal training program (C.A.A. B 11-30-72:142); but women were not allowed to watch and learn (Pet. A. 30a; Finding 31). When women tried to "set-up" they were given less time than men to make the set-up (C.A.A. A 5-25-71:15, 38).

The McBee personnel cards indicate that many men were made first class operators with no experience on the machine which they were made first class (Pet. A. 30a; Finding 31), upon e.g., Donald M. Fraser bumped Norma Ferrante on April 17, 1960, at job No. 40-27.1 as a first class operator, and he had never held that job position before (R. Plt's Ex. CC). Ostapowicz presented evidence that over 11 different men were made first class operators having never held the position before—either on a bump or on bids (R. Plt's Exs. CC, EE,

[5] Johnson's witness, Dicola, admitted that from 1967 to 1971 there were no bids open (C.A.A. B 210a).

GG, HH, II, JJ, KK, LL, MM, OO, QQ, RR). Johnson made Clifford R. Brown a first class machine operator 34 days after he was hired in 1966 (R. Plt's Ex. KK) and Robert C. Donnell a first class machine operator 27 days after he was hired in 1966 (R. Plt's Ex. LL).[6]

This contrasts with the fact the claimant Norma Ferrante who was described as a "very good operator, very much interested in her job" (C.A.A. B 3-13-73:600, 607) by *Johnson's* witness, was employed at this same time by Johnson and was never made a first class machine operator in the areas where employee Brown or Donnell were made first class machine operators. After Ferrante was bumped by Frazier, she bumped William Logue on April 29, 1960, job No. 40-145.1 but was disqualified (C.A.A. C 469a [Ferrante's McBee card]).[7] This evidence indicates that Johnson arbitrarily and unfairly promoted male employees to first class machine operators when female employees who had long experience on the various machines were left as second class machine operators (Pet. A. 30a; Finding 31). Ostapowicz had four years experience on the chamfering machine, but when she wanted to bump on said machine, she was told it was foolish (Pet. A. 31a; Finding 42). The evidence indicated that the management of Johnson which determined whether or not a woman became a first class machine operator consisted solely of males (Pet. A. 31a; Finding 35).

[6] At the damage hearing Ostapowicz established that out of 550 promotions to first class for men, in 397 times the men had no prior experience. These figures did not include disqualifications (R. [Damages] Plt's Ex. 66).

[7] Ferrante tried to be first class but was disqualified April 1952, March 28, 1958; January 25, 1959, April 29, 1960, January 1964. Ostapowicz tried to qualify in 1960, 1965 and 1970. After the case was in trial, Ostapowicz made first class in February 1973, and Ash made first class in April 1973 (R. [Damages] Plt's Ex. 16A and Ex. 17A).



Johnson introduced no credible evidence which contradicted the statistics that only one woman was ever made first class during all of the years of the defendant's operation through 1972. Evidence indicated that strength was not a determinative factor in becoming a first class operator (Pet. A. 29a; Finding 25), and that females were physically capable of making set-ups (C.A.A. B. 11-30-72:172). This evidence was introduced by Johnson.

In addition to the arbitrary classifications of various men to first class machine operators, evidence established that contrary to the claim of Johnson, first class machine operators did not always set-up their own machines. In an average month, 1,600 set-ups were made by first class operators and machine setters made 1,450 set-ups (Pet. A. 30a; Finding 32). First class operators spent about 1,900 hours on set-ups, and the machine setters spent about 2,000 hours on set-ups (Pet. A. 30a; Finding 33). Evidence from Johnson's own witnesses indicated that machine setters make difficult set-ups for first class machine operators, and that set-ups on long runs are made for first class machine operators by machine setters (Pet. A. 31a; Finding 34). These facts indicate that not only has Johnson arbitrarily classified men as first class machine operators and arbitrarily kept females as second class machine operators; but in fact, Johnson has allowed first class machine operators who are male to be helped by machine setters, so that in effect, second class operators and first class operators are at many times doing the same work.

### 6. *Lay-offs, recalls and terminations*

During the years after 1967, Johnson faced a recession period, and the total employees of Johnson dropped drastically (R. Stip. Exs. VV, WW, XX, YY, ZZ, AAA,

BBB). The contract between the union and Johnson, Article XXI, page 45, paragraph 167, causes second class machine operators who are senior to first class operators to be laid off before the first class machine operators (R. Stip. Ex. 35). The contract, Article XXI, page 44, paragraph 159, states that if a bid is posted first class and there are no bidders, Johnson will change such bid to second class operator only if Johnson has a machine setter permanently assigned to the machine group (center); but Johnson is in sole control of whether or not a machine setter is permanently assigned; and it is an economic decision (C.A.A. B 2-13-73:371, 372). Johnson is also the sole agent in determining who makes first class machine operator (C.A.A. B 2-13-73:372-374). Thus, it is a management decision as to whether or not a person makes first class machine operator, and whether or not a machine setter is assigned to a certain machine group or center.

Johnson forced the women to remain as second class machine operators, and Johnson could arbitrarily decide whether or not bids were placed for jobs first or second class by determining whether or not a machine setter was permanently assigned to the machine group. If for economic reasons, Johnson would save money by not having a machine setter assigned to the machine group, then a bid would never be posted second class. Since all women who were laid off were second class, it was impossible for these second class women, who were senior to many males, to be recalled for work since 1967 because after 1967, bids were very limited (C.A.A. B 2-13-73:371, 372).[8]

Female employees who were laid off and who had not previously bumped on a certain job classification were

[8] Mr. Wise's testimony at C.A.A. A 8-12-71:118-119 indicates how Ferrante, the only first class woman, was not notified of a bid.



automatically not recalled to that classification at any time in the future because at some time in the past they had turned down a bump on a particular job (Pet. A. 32a; Finding 48).

### *7. Promotion and Wages*

Statistics were presented by Ostapowicz indicating that no women were ever promoted to machine setters, foremen, or assistant foreman (C.A.A. B 11-30-72:23, 24). Evidence indicated that the management was solely responsible for determining who was made a machine setter, assistant foreman or foreman and there were no contract provisions and no objective tests given to determine this (C.A.A. B 11-30-72:218). Evidence further indicated that all of the people in management who made these decisions were male (C.A.A. B 11-30-72:218).

Statistics were introduced which indicated that on a wage scale with the highest base wage at $4.51 per hour, no females were employed in a base wage scale of over $3.32 per hour. All of the wage scales between $3.32 and $4.51 which made up approximately one-third of the various job classifications were occupied by males (Pet. A. 31a; Findings 40, 41).[9]

Johnson introduced no credible evidence[10] to rebut the statistics concerning promotions presented by Ostapowicz and introduced no defenses such as a bona fide job qualification or business necessity to explain the lack of promotion of any females to these positions.

[9] The opinion has a misprint of $2.32 per hour.

[10] The lower court rejected the testimony of women witnesses for Johnson because of the lack of veracity; of the ten female witnesses that testified for Johnson nine had signed grievances or charges of discrimination (R. Plt's Ex. TT).

## VI.

## ARGUMENT

**A. The 1968 Charge was filed in a timely manner, Ostapowicz was a member of the class aggrieved under that charge, she received a right to sue letter under that charge and filed a federal court action acting under the statutory notice of right to sue; therefore, the jurisdictional prerequisites of a federal Title VII action have been satisfied.**

There is no conflict whatsoever in the circuits concerning the jurisdictional prerequisites of a suit under § 706-(f)(1) of Title VII of the Civil Rights Act of 1964 as amended 42 USC 2000e-5(f)(1) (hereinafter "Title VII"). There isn't any ambiguity in this Court's decision concerning the prerequisites to a Title VII suit.

In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973) (hereinafter "Green"), this Court stated:

> "Respondent satisfied the jurisdictional prerequisites to a federal action (i) by filing timely charges of employment discrimination with the Commission and (ii) by receiving and acting upon the Commission's statutory notice of the right to sue, 42 USC §§ 2000e-5(a) and 2000e-5(e). The Act does not restrict a complainant's right to sue to those charges as to which the Commission has made findings of reasonable cause, and we will not engraft on the statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts. . . ." *Id.* at 411 U.S. 798.

In the instant case, Ostapowicz has clearly satisfied the jurisdictional requirements. The charge, as set forth at 4,



*supra,* clearly is a broad charge of discrimination. It was filed in a timely manner. Ostapowicz received a right to sue letter under the charge and acted in federal court in a timely manner. The 1970 Charges are mere surplusage to the original charge. There is no prerequisite of reasonable cause or conciliation needed. Section 706-(e) of Title VII [now amended and replaced by § 706-(f) (1)] allowed Title VII complainants to go into federal court after a certain period of time without the EEOC taking *any* action concerning the charge. *Fekete v. U.S. Steel Corp.*, 424 F.2d 331 (3rd Cir. 1970).

Further, this Court has stated in *Love v. Pullman Co.*, 404 U.S. 522, 92 S. Ct. 616 (1972) that Title VII prerequisites should not be interpreted in a technical fashion so as to overly burden nonlawyer aggrieved persons.

One can reason, as the appellate court did, that the 1970 Charges were filed (in the fall of 1970) before conciliation discussions took place, and Ostapowicz merely amended the original broad charge brought by the union on her behalf with more specific charges (Pet. A. 10a, 11a). However, the district court correctly applied McDonnell Douglas Corp. v. Green, *supra.*

Both the district court and the appellate court cited *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970) as authority that the federal complaint must reasonably relate to the "EEOC Charge". The facts clearly indicate this to be true, and the district court has so held (Pet A. 25a; Finding 3; 34a). The appellate court has affirmed this factual determination (Pet. A. 10a).

Therefore, the jurisdictional argument of the Petitioner has been clearly decided by this Court in Green, *supra,* and the Petition should not be accepted by this Court on jurisdictional grounds.

**B. The appellate court's holding that under Green v. McDonnell Douglas Corp. once a plaintiff has established a prima facie case the burden shifts to the defendant to rebut the prima facie case by the weight of the evidence is supported by the decisions of this Court.**

In Green v. McDonnell Douglas Corp., *supra,* this Court stated that once a plaintiff has established a prima facie case of discrimination:

> The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. We need not attempt in the instant case to detail every matter which fairly could be recognized as a reasonable basis for a refusal to hire. Here petitioner has assigned respondent's participation in unlawful conduct against it as the cause for his rejection. We think that this suffices to discharge petitioner's burden of proof at this stage and to meet respondent's prima facie case of discrimination. *Id.* at 411 U.S. 802, 803.

It is literally correct that the words "to articulate some legitimate nondiscriminatory reason" do not say that the burden of proof shifts to a defendant to rebut the prima facie case of the plaintiff by the weight of the evidence. However, the last sentence of the above quote does literally use the words "burden of proof", and it is clear that a shift of the burden is the intent of this Court from subsequent decisions of this Court.

This Court has addressed the burden of proof of a defendant in two related and analogous Title VII cases. In Franks v. Bowman Transportation Co., Inc., 423 U.S. 814, 96 S. Ct. 1251 (1976) this Court considered a defendant's burden of proof in a Title VII "Stage II" (remedy) proceeding. The Court stated:



> But petitioners here have carried their burden of demonstrating the existence of a discriminatory hiring pattern and practice by the respondents and, therefore, *the burden will be upon respondents to prove that individuals who reapply were not in fact victims of previous hiring discrimination.* Cf. McDonnell Douglas Corp. v. Green, 411 U.S., at 802, 93 S.Ct. at 1824, 36 L.Ed.2d., at 677, Baxter v. Savannah Sugar Refining Corp. 495 F.2d 437, 443—444 (C.A. 5), cert. denied, 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 308 (1974) Only if this burden is met may retroactive seniority—if otherwise determined to be an appropriate form of relief under the circumstances of the particular case—be denied individual class members. *Id.* at 96 S. Ct. 1268. (emphasis added)

Justice Brennan used the signal "Cf." in citing McDonnell Douglas Corp. v. Green. The signal indicated that McDonnell Douglas Corp. v. Green was analogous to the instant citation. The difference was that McDonnell Douglas was a Stage I (liability) proceeding rather than a Stage II (remedy) proceeding.

In another analogous situation, Albemarle Paper Company v. Moody, 422 U.S. 407, 95 S. Ct. 2362 (1975) this Court stated:

> In Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed. 2d 158, this Court unanimously held that Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets 'the burden of showing that any given requirement [has] . . . a manifest relation to the employment in question.' *Id.*, at 432, 91 S.Ct. 854. *This burden arises,* of course, only after the complaining party or class has made out a prima facie case of discrimination—has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d

> 668. If an employer does then meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmenship.' *Id.*, at 801, 93 S.Ct. at 1823 *Id.* at 95 S. Ct. 2375. (emphasis added)

In this quotation, this Court used the signal "See" to again cite to McDonnell Douglas Corp. v. Green as constituting basic source material which would support shifting the burden of proof.

Not one circuit court has held that Green does not stand for shifting the burden of proof to the defendant to come forward with the weight of the evidence and disprove the prima facie case of a plaintiff.[11]

In short, the respondent has a credibility problem not a burden of proof problem. This is not a case where a defendant was not given the opportunity to rebut a plaintiff's *prima facie* case. This is a case where a defendant has no credibility. As the district court stated at 369 F. Supp. 537, Pet. A. 52a, 53a:

> While defendant has produced a large amount of testimony indicating that certain women are happy in the plant and thought that there was no discrimination and while various officials disclaimed any intention of sex discrimination, nevertheless, we weigh this evidence in

[11] *Boston Chapter N.A.A.C.P., Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974); *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239 (3rd Cir. 1975), *cert. denied*, .... U.S. .... 95 S. Ct. 2415 (1975); *United States v. International Union of Elevator Constructors*, 538 F.2d 1012 (3rd Cir. 1976); *Pettway v. American Cast Iron Pipe Company*, 494 F.2d 211, 225 (5th Cir. 1974); *Peters v. Jefferson Chemical Company*, 516 F.2d 447, 450 (5th Cir. 1975); *Potter v. Goodwill Industries of Cleveland*, 518 F.2d 864, 865 (6th Cir. 1975); *Motorola, Inc. v. McLain*, 484 F.2d 1339, 1344, 1345 (7th Cir. 1973); *Gilmore v. Kansas City Terminal Ry. Co.*, 509 F.2d 48 (8th Cir. 1975); *Franklin v. Troxel Manufacturing Co.*, 501 F.2d 1013, 1014, 1015 (10th Cir. 1974); *Douglas v. Hampton*, 512 F.2d 976, 981 (D.C. Cir. 1975).



> the light of the principal that actions speak more loudly than words. The court frankly in the light of all the testimony in the case does not believe the disclaimers of lack of intent to discriminate."

This Court has clearly stated in analogous cases that once a *prima facie* case is presented by oral testimony or statistics in a Stage I (liability) Title VII proceeding, or once the pattern of liability discrimination has been shown in a Stage II (damage) proceeding, or once test examinations have been shown to have a disparate effect upon a minority group; the burden clearly shifts to the defendant to come forward with the weight of the evidence and overcome the *prima facie* case. In the instant case, the respondent has come forward with no evidence which has been accepted by the finder of fact. Respondent is urging this Court to overcome its lack of credibility with a play on semantics.

## VII.

## Conclusion

Both the jurisdiction and evidence questions proferred by the Petitioner have clearly been determined by this Court. This is not conflict in any circuit courts interpreting these questions. The petition should be denied.

Respectfully submitted,

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